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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE STATE RECORD CO., INC.,
Petitioner,

v.

B. J. QUATTLEBAUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case that has been litigated in the United States since 1970.

This brief[1] is submitted on consent of the parties.

STATEMENT OF THE CASE

The Reporters Committee adopts the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Courts are struggling to apply the standard created by this Court to determine the constitutionality of prior restraints on non-party media in the context of considering whether to suppress information which may appear to affect a defendant's Sixth Amendment rights. In upholding the prior restraint in the case at bar, the South Carolina Supreme Court specifically stated, "Our decision to affirm the circuit court's issuance of a temporary restraining order is bolstered by the uncertainty

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *Amicus* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than *Amicus* made a monetary contribution to the preparation or submission of this brief.

of the precise standard necessary to justify a prior restraint." It has been over twenty years since this Court issued its ruling in *Nebraska Press Ass'n*, 427 U.S. 539 (1976), which, like the case at bar, involved a prior restraint on non-party media in a criminal proceeding. This Court held that, "[T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings." *Nebraska Press Ass'n*, 427 U.S. at 559. This Court further held that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" because they "freeze" speech on important matters of public concern. *Id.* The case at bar presents an opportunity for this Court to affirm the powerful prohibition against prior restraints as guaranteed by longstanding precedent and the United States Constitution.

Confusion in the judiciary regarding the application of this Court's test to determine the constitutionality of prior restraints on the press in a criminal context is not unique to South Carolina. In a recent case in Mississippi, a state court judge misapplied or ignored this Court's precedent and issued a prior restraint which led to a reporter being jailed for four hours. Although the Mississippi Supreme Court ultimately reached the correct result by holding that the prior restraint was invalid, the damage to the press was irreparable. In another recent example, a state court judge in Tennessee relied, at least in part, on the incorrect ruling in the case at bar to uphold a prior restraint on a non-party news organization in a criminal proceeding. The Mississippi and Tennessee cases demonstrate the need for this Court to reaffirm both the presumption against the validity of prior restraints on non-party media in the criminal context and the three-part test set forth in *Nebraska Press Ass'n*. The fact that the case at bar is being used as precedent to justify prior restraints on the press

in at least one other jurisdiction demonstrates the need for this Court to review it.

By reversing the South Carolina Supreme Court's clearly unconstitutional ruling, this Court can protect the freedom of the press and reverse what has already become a damaging precedent. Accordingly, *Amicus* respectfully requests that *certiorari* be granted.

ARGUMENT

I. PRIOR RESTRAINTS POSE A FUNDAMENTAL THREAT TO FREEDOM OF THE PRESS

This Court has long made clear that a prior restraint carries "a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" because they "freeze" speech on important matters of public concern. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (articulating the following three-part test for analyzing the validity of prior restraints: (1) whether the nature and extent of pretrial coverage would threaten the defendant's Sixth Amendment rights; (2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (3) how effectively a restraining order would operate to prevent the threatened danger).

This Court has never upheld a prior restraint in any of

the many cases where the validity of such restraints has been at issue.[2] Prohibiting the publication of a news story is "the

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[2] Although not a decision on its merits, in *United States v. Noriega (In re Cable News Network)*, 917 F.2d 1543 (11th Cir.), *cert. denied sub. nom, Cable News Network v. Noriega*, 498 U.S. 976 (1990), this Court denied *certiorari* to a television network which had sought relief from a district court order prohibiting it from broadcasting legally obtained recorded conversations between a criminal defendant and his lawyer. In a strongly worded dissent, Justice Marshall, joined by Justice O'Connor, found that the *Noriega* case provided a good opportunity to reexamine the prior restraint doctrine. Justice Marshall stated, "[I]f the lower courts in this case are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established by *Nebraska Press*, then I think it is imperative that we reexamine the premises and operation of *Nebraska Press* itself." *Cable News Network v. Noriega*, 498 U.S. 976, 976-77 (1990) (citations omitted).

For examples of cases where prior restraints on publication were struck down by this Court on the merits, *see, e.g., Near v. Minnesota*, 283 U.S. 697 (1931) (Lifting an injunction upon the continued publication of a consistently false and defamatory newspaper on the ground that it constituted an invalid prior restraint on publication); *New York Times Company v. United States*, 403 U.S. 713 (1971) (Refusing to enjoin the publication of information contained in the so-called "Pentagon Papers," on the ground that, notwithstanding the possibility that publication could threaten national security, the government had failed to meet its burden to justify a prior restraint on publication); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319 (1975) (Reversing an injunction imposed upon the pretrial publication of information regarding a sensational murder case, on the ground that, notwithstanding a generalized risk to the defendant's fair trial rights, the record failed to show that pretrial publicity would necessarily prejudice jurors).

essence of censorship, and is allowed only under exceptional circumstances." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (quoting *In the Matter of Providence Journal Company*, 820 F.2d 1342, 1351, *modified on reh'g by* 820 F.2d 1354 (1st Cir. 1986), *cert. granted and dismissed on other grounds*, 484 U.S. 693 (1988)). Even "where questions of allegedly urgent national security, or competing constitutional interests, are concerned, the Supreme Court has imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." *Procter & Gamble Co.*, 78 F.3d at 225 (quoting *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations omitted)).

The seminal case *Nebraska Press Ass'n* involved a prior restraint on non-party media in a criminal proceeding where, as in this case, the defendant's Sixth Amendment right to a fair trial were implicated. This Court held in *Nebraska Press Ass'n* that, "[T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings." *Nebraska Press Ass'n*, 472 U.S. at 559. Accordingly, this Court vacated an order restraining the press from publishing or broadcasting accounts of admissions made by the accused, or of facts "strongly implicative" of him. *Id.* at 570. In the opinion written by Chief Justice Burger, this Court recognized that the press is important to the effective administration of justice as a safeguard against miscarriages of justice and as a means of assisting public scrutiny. *Id.* at 560 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). In a separate concurring opinion, Justice Brennan, joined by Justices Stewart and Marshall, advocated an absolute ban on prior restraints on publication of information related to a

criminal trial. *Id* at 572. He concluded that, even though the right to a fair trial is one of the most sacred rights, a prior restraint is an impermissible way to attempt to enforce or protect it. *Id.* at 572, 586.

In a separate concurring opinion, Justice White stated that it was difficult to see how the standard created by the decision could ever be met, but that he would wait for more cases before suggesting the adoption of an absolute rule. *Id.* at 570-571. Justice White also stated that the Court should at some point announce a more general rule to avoid what he predicted would be "interminable litigation." *Id.* As the South Carolina Supreme Court's misinterpretation of this binding precedent illustrates, the time has come for this Court to revisit Justice White's suggestion and reaffirm *Nebraska Press Ass'n*.

To permit the present ruling to stand would establish a profoundly damaging precedent permitting the news media to be enjoined from publishing thoughtful, accurate information of interest to the public. Notably, the case at bar already has been cited in another jurisdiction as a basis for upholding a similar prior restraint on publication. *See Tennessee v. Huskey*, No. 51903, (Crim. Ct. 6th Dist., Order converting temporary restraining order into temporary injunction, Nov. 4 1998) (see discussion below). It has been over twenty years since this Court issued its ruling in *Nebraska Press Ass'n*. *Amicus* respectfully submits that this case presents a good opportunity for this Court to affirm the powerful prohibition against prior restraints as guaranteed by longstanding precedent and the United States Constitution. Accordingly, *Amicus* urges this Court to grant the petition for *certiorari* in the case.

II. STATE AND FEDERAL COURTS INCREASINGLY UPHOLD RESTRAINING ORDERS ON THE PRESS IN CONTRAVENTION OF THIS COURT'S PRECEDENT

In the case at bar, the South Carolina Supreme Court's decision to uphold a prior restraint on *The State* underscores the need for this Court to reaffirm the principle that "barriers against prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Ass'n*, 427 U.S. at 704. In its opinion, the South Carolina Supreme Court specifically stated, "Our decision to affirm the circuit court's issuance of a temporary restraining order is bolstered by the uncertainty of the precise standard necessary to justify a prior restraint." *The State-Record Co., Inc. v. Quattlebaum*, 504 S.E.2d 592, 597 (S.C. 1998). *Amicus* notes that this confusion is not unique to South Carolina. According to law professor Alberto Bernabe-Riefkohl:

> [T]he end result of the prior restraint analysis in *Nebraska Press* was to leave the door open for abuse of the system by allowing courts to tell the media that it cannot publish truthful information about events of public concern. This may be the increasing trend of a high number of unreported cases, where a trial court issues a quick temporary injunction, only to lift it or have an appellate court vacate it. This trend can lead to prior restraints becoming easier to obtain than the standards of *Nebraska Press* intended.

Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 Ky. L. J. 259, 313 (1995/1996) (citations omitted). In a disturbing trend, trial courts in recent years have either ignored or grossly misinterpreted the *Nebraska Press Ass'n* decision and its procedural safeguards. *Amicus* directs this Court to two recent state court criminal cases where prior restraints on the press were issued to illustrate why this Court needs to reaffirm the principles set forth in *Nebraska Press Ass'n*.

In *Jeffries v. State of Mississippi*, No. 97-KA-00796-SCT, 1998 Miss. LEXIS 603, at *1 (Miss. Dec. 17, 1998), Cynthia Jeffries, a reporter for the *Delta Democrat Times*, attended an open manslaughter sentencing hearing for defendant Brian Hollingsworth in the Circuit Court of Washington County on June 6, 1997. During sentencing, the prosecutor read aloud in open court portions of Hollingsworth's juvenile record in an effort to persuade the judge to impose the maximum sentence for manslaughter. Following the prosecutor's statements, Judge Shirley Byers asked Jeffries to approach the bench. *Id.* at *2. Judge Byers told Jeffries not to publish the juvenile record and warned her that if she did publish, she would be held in contempt of court. *Id.* Despite the admonition by the court, the *Delta Democrat Times* ran an article on June 11 written by Jeffries which included details of Hollingsworth's record. *Id.* at *2-*3. After the article was published, Jeffries was arrested, found in direct contempt of court and sentenced to seventy-two hours in jail. *Id.* at *3.[3]

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[3] Jeffries ultimately served four hours in jail. After serving the four hours, she was released pending [Footnote continued on next page.]

More than a year later, in a brief filed in July 1997, the state conceded that: (1) Jeffries's actions could not form the basis of a direct contempt charge; (2) Jeffries was not afforded the procedural safeguards required for a charge of constructive contempt;(3) Judge Byers' order was a prior restraint on speech; and, (4) Jeffries was authorized to contest the order by disobeying it. *Id.* at *4-5.

The Mississippi Supreme Court finally reversed Jeffries' conviction and vacated her sentence in December, 1998. *Id.* at *10. According to the Court, "Obedience to the lower court order would have damaged Jeffries's right to freedom of speech." *Id.* at *6-*7. The Court noted that Judge Byers' order barring Jeffries from reporting on Hollingsworth's juvenile record was presumptively invalid under *Nebraska Press Ass'n. Jeffries* at *6. Moreover, the Court specifically noted that the lower court completely failed to weigh the prior restraint factors set out by this Court in *Nebraska Press Ass'n. Id.* at *9-*10. The Court stated that less extreme measures were available; the judge could have reviewed the juvenile record on her own or had counsel brief it for her in writing instead of discussing it in open court. *Id.* at *7. Ultimately, the Court held, "In Mississippi courts as well as in federal courts, the protection of free speech is sacred and not to be dismissed lightly by trial judges." *Id.* at *9.

In *Jeffries,* the state's eventual concession that Byers' order was unconstitutional demonstrates how a

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[Footnote continued from previous page.]
an appeal. *See Brief on Appeal for Appellant, Jeffries v. Mississippi, Case No. 96-KA-0796* at 6.

court's "uncertainty of the precise standard necessary to justify a prior restraint" can dramatically violate the First Amendment rights of the press and the public. By the state's own admission, the initial restraint on Jeffries never should have been issued. But Judge Byers' misapplication or misunderstanding of the standard for issuing a prior restraint placed a reporter in jail for four hours, and chilled both her and her newspaper for over a year while the case made its way through the judicial process. Although the Mississippi Supreme Court reached the correct result by holding that the prior restraint on Jeffries was invalid, the damage to the press, and to Jeffries, was irreparable.

As the Sixth Circuit recognized in the context of a restraining order imposed on a non-party publisher in a civil case:

> Where the freedom of the press is concerned . . . the status quo is to publish the news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. . . . Rather than having no effect, a prior restraint by . . . definition, has an immediate and irreversible sanction.

Procter and Gamble Co., 78 F. 3d at 226. As *Jeffries* illustrates, the South Carolina Court is not the only court that has ignored or misinterpreted the unbroken precedent that forbids virtually any prior restraint on publication of truthful

and accurate information.[4]

The insidious effect of this judicial confusion is further illustrated by a recent ruling in Tennessee, *Tennessee v. Huskey*, No. 51903 (Crim. Ct. 6th Dist., Order converting temporary restraining order into temporary injunction, Nov. 4 1998). That erroneous ruling can be traced, at least in part, to the judge's reliance on the incorrect ruling in the case at bar.

In *Huskey*, a state criminal trial court issued and then upheld an order to restrain *The Knoxville News-Sentinel* from publishing information it had legally received. *Id.* at 6. *The News-Sentinel* had previously intervened in the case in June 1997 seeking access to sealed attorney bills, time sheets, and expenses related to the defense of Thomas "Zoo Man" Huskey, charged with four counts of capital murder.[5]

On October 22, 1998, a reporter for the *News-Sentinel* contacted one of Huskey's attorneys and told

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[4] *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (allowing publication of name of victim of sexual offense); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (allowing publication of the lawfully obtained name and picture of a juvenile offender).

[5] In July 1997, the trial court ordered disclosure of the total amount paid for Huskey's defense and experts, but kept the attorneys' detailed time sheets sealed. On appeal, the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court upheld the trial court's decision. *See The Knoxville News-Sentinel v. Huskey*, No. 03C01-9708-CR-00331, 1998 Tenn. Crim. App. LEXIS 237 (Tenn. Crim. App. Feb. 24, 1998), *cert. denied*, 1998 Tenn. LEXIS 428 (Tenn. July 13, 1998).

him that he possessed copies of the sealed time records.[6] *Huskey*, No. 51903, at 1. The attorney immediately attempted to block publication of any story about them. *Id.* at 2. The trial court issued a temporary restraining order, forbidding the newspaper to publish or disseminate any information from the detailed time records. The newspaper chose to disregard the order, concluding that it was "transparently invalid" and therefore unconstitutional. *Id.* at 3-4.

Subsequently, the trial court ruled favorably on Huskey's motion to convert the temporary restraining order into a temporary injunction, upholding its earlier decision finding that a prior restraint was necessary to protect the defendants rights. *Id.* at 6-7.

In support of its ruling, the trial court stated that this Court has refused to assign priorities between the First Amendment and the Sixth Amendment, citing *Nebraska Press Ass'n. Huskey*, No. 51903, at 4. The trial court also cited the case at bar as a basis for upholding the prior restraint. *Id.* at 5-6. The trial court compared Huskey's situation to that of Quattlebaum, stating:

> [R]ecently, a similar issue has been addressed by another jurisdiction. In *State Record Co. v. State*, [sic] 504 S.E.2d 592 (S.C. 1998), the South Carolina Supreme Court held that under the facts presented there, the trial court's duty to ensure that the defendant received a fair

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[6] According to the trial court, the newspaper had received the time records from a confidential source. *Huskey*, No. 51903, at 3.

trial warranted imposition of a prior restraint.

Huskey, No. 51903, at 5-6.

As this example illustrates, not only are trial judges having difficulty interpreting this Court's precedent, but at least one has relied upon the case at bar to justify prior restraints on the press. This Court should review it. Although the *Huskey* case is being appealed in the state court system and may eventually be reversed,[7] regardless of the eventual outcome, there can be no dispute that the case at bar has already become a dangerous precedent. Courts are struggling to apply the standard created by this Court to determine the constitutionality of prior restraints on the press, especially in the context of considering whether to suppress information which may appear to affect a defendant's Sixth Amendment rights. *See KUTV v. Wilkinson*, 686 P.2d 456 (Utah 1984) (upholding a prior restraint prohibiting the news media from reporting on a criminal defendant's alleged connections to the Mafia, reasoning that that repeated warnings and sequestration would prejudice the jury against the defendant).

Rather than abandon state and federal courts to probe the limits of the strong presumption against prior restraints on their own, this Court should seize the opportunity to reaffirm and clarify the exacting test that assures the First Amendment rights of the press and the public will not be eviscerated.

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[7] *The News-Sentinel* filed an application for permission to appeal in the Court of Criminal Appeals for the State of Tennessee at Knoxville on December 9, 1998. On December 16, 1998, the application for appeal was granted. As of January 26, 1998, the case is pending.

CONCLUSION

In its entire history, this Court has never upheld on the merits a prior restraint on a non-party news organization in a criminal proceeding. Although acknowledging that an exceptional case could conceivably arise in which such a prior restraint would be appropriate, *Near*, 283 U.S. at 716 (restraint on publication of information concerning the sailing of troop ships during wartime might be justified), this Court has yet to find such a case. To permit the trial court's order to stand would effectively repudiate the clear and unequivocal mandate of the First Amendment and some 60 years of unwavering Supreme Court precedent.

For that reason, the South Carolina Supreme Court's ruling threatens all publishers and journalists, including movants. Accordingly, *Amicus* requests that *certiorari* be granted.

Respectfully submitted,

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